No. 2719

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPH E. WISE, et al,
Apellants,

vs.

CORNELIUS C. WATTS et al,
Appellees.

ADDITIONAL BRIEF FOR APPELLEES CORNELIUS C. WATTS AND DABNEY C. T. DAVIS, JR., WHO WERE THE PLAINTIFFS BELOW

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STATEMENT OF FACTS.

After the treaty of Guadalupe Hidalgo and the Gadsden Purchase, by which the United States acquired additional territory, there were numerous Mexican Grants, titles of which were unsettled. The United States, in order to determine the validity of these grants, in 1854 passed an Act wherein the Surveyor General of New Mexico was directed, under instructions of the Secretary of the Interior, to make investigations as to the titles and ownership of these grants and to report as to his proceedings and findings.

There was a certain grant known as Las Vegas, to which there were two claimants, one the town of Las Vegas and the other certain heirs of one Luis Maria Cabeza de Baca. This man had died in 1827, leaving surviving him, at the time now in question, eighteen children, sons and daughters, and their descendants. These children, claiming to be the heirs, by John S. Watts, an attorney at law, and as their attorney, made claim to the said Las Vegas grant, all as set out in full in the petition of Watts and the affidavits accompanying it. (Record, pages 165-173.) An alleged son of Luis Maria Baca, called Antonio, was not included.

The Surveyor General of New Mexico reported upon this grant, and Congress, in its investigations, having determined that the title of the Baca claimants was meritorious, but having also determined to confirm the grant in the other claimant, the Las Vegas town, on the 21st of June, 1860, passed an Act, by the Sixth Section of which it is provided:

> "That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the same tract of land as is claimed by the town of Las Vegas to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies, not exceeding five in number * * * That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this Act and no longer."

In 1862, John S. Watts, still acting for the heirs of Baca, made selection as the third of the series a tract of land situate in the present state of New Mexico, known as Bosque Redondo. This selection was, a short time afterward, with the consent of the Government, rescinded and abandoned and went for naught.

On the 17th day of June, 1863, Watts, still acting for the heirs of Baca, and as their attorney, selected as Location No. 3 of the Baca series a tract of land in the present state of Arizona, and being the land involved in this litigation. This selection was approved by the proper officials. In the selection the land is described as follows:

> "Commenging at a point one mile and a half from the base of the Salero Mountain, in a direction North fortyfive degrees East of the highest point of said mountain, running thence from said beginning point West," etc.,

so as to take in a tract a little more than twelve miles square and comprising almost one hundred thousand acres.

Between the dates of the abandonment or recission of the first or Bosque Redondo selection, which was in February, 1863, and the selection of Location No. 3 in Arizona, the said John S. Watts, claiming to be the owner of an unlocated float of the Baca heirs, executed to William Wrightson, in consideration of the sum of $110,000, a paper called a Title Bond, in which he sold to said Wrightson the said unlocated tract, with all of its privileges. The particular tract, that is to say, the number of the selection or location, is not mentioned in this instrument. (Record, pages 183-185.) Later on, however, on the 27th of March, 1864, Watts wrote Wrightson a letter in which he says that he encloses the certificate of the Register and Receiver in New Mexico that the location made in Arizona was made in compliance with the Act, and that he hopes this certificate will enable Wrightson to get the location confirmed. Upon this letter, which is now on file in the Land Office at Washington, are certain endorsements, which show that the certificates that Watts enclosed related to Location No. 3 in Arizona. (Record, page 191.) Later still, in a letter written by Watts to

the Commissioner of the Land Office, on April 30, 1866, in regard to Location No. 3, Watts speaks of Mr. Wrightson as having been killed by the Indians while he was making an examination of Location No. 3 in Arizona. These matters show that the title bond given by Watts to Wrightson, in March, 1863, referred to Location No. 3 in Arizona, the land here in question.

On the first of May, 1864, the heirs of Baca, and being the same heirs who had made claim to the Las Vegas Grant, as heretofore mentioned, conveyed to Watts Location No. 3 as selected June 17, 1863. The description of boundaries is the same, that is, commencing at a point one and one-half miles from the base of the Salero Mountain, in a direction North forty-five degrees East of the highest point, and running thence so as to take in a body of one hundred thousand acres, as before stated. There are some imperfections in the execution of this deed but the deed purports to be executed by all eighteen of the heirs who had made claim to the Las Vegas Grant, as before stated. This conveyance covers other lands than Location No. 3 as well, and is the first conveyance from the Baca heirs to Watts.

In 1866, Watts wrote the Commissioner of the General Land Office, saying that the 1863 location of the third of the Baca series had been made without a personal examination, and that a mistake had been made in the description as to the initial point. He asked leave for authority to amend or change the initial point of the boundary so as to make it commence at a point three miles West by South from the building known as the Hacienda de Santa Rita instead of a mile and a half Northeast from the highest point of the Salero Mountain. He concludes this application with the prayer that it is hoped that directions will be given to the Surveyor Gen-

eral "to correct the mistake." To this letter, the Commissioner replied in the same year, 1866, permitting Watts to correct the error and instructing the Surveyor General of New Mexico to cause the survey to be made in accordance with the amended description.

We have thus two descriptions of this selection, that of June 17, 1863, where the initial point is a mile and a half Northeast of Salero Mountain, and the amended description of 1866, where the initial point is three miles West by South from the building known as the Hacienda de Santa Rita. These descriptions largely cover entirely different lands, the amended description of 1866 being largely Northeast of the '63 description, there being a tract of some 6,000 acres only covered in common by both descriptions.

In 1870, one Hawley having come into possession of the Wrightson title bond heretofore mentioned, Watts conveyed to Hawley Baca Float or Location No. 3. The words of grant in this conveyance are "remise, release and quit-claim unto the said party of the second part and to his heirs and assigns forever, all that certain tract, piece or parcel of land," etc. The description of the property conveyed is, "all that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains, in the Territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the first day of May, A. D. 1864, bounded and described as follows: Beginning at a point West by South from the building known as the Hacienda de Santa Rita, running thence," etc., * * * "The said tract of land being known as Location No. 3 of the Baca Series." (Record, page 194.) The omission in

the description so quoted refers to the courses and distances covering a tract of land practically twelve miles square.

In 1871, the Baca heirs, that is to say, the eighteen children of Luis Maria Baca and their descendants, who had made claim to the Las Vegas Grant, as before stated, and purporting to be all of the children and descendants of Luis Maria Baca, conveyed to Watts, Location No. 5 of the Baca series, and in this conveyance is added the following:

"And the said heirs of Luis Maria Baca above mentioned now ratify and confirm the title made by our attorney Tomas Cabeza de Baca to John S. Watts, his heirs and assigns, on the first day of May, 1864, * * * for Location No. 3, situate in Arizona Territory * * *; and the said heirs of the said Luis Maria Baca, deceased, executing this deed as herein set forth, relinquish and quitclaim to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1, 1864, mentioned and described."(Record, page 202.)

The title that Hawley obtained in 1870 is now vested by mesne conveyances in the plaintiffs and appellees, Cornelius C. Watts and Dabney C. T. Davis, Jr., as to the South one-half of the tract, and in the Bouldins, defendants and appellees, as to the North one-half.

In 1884, John S. Watts having died, his heirs executed what purports to be a deed of an undivided two-thirds interest in Baca Float No. 3, with the outboundaries of the 1863 selection, to one David W. Bouldin. In this conveyance was included a power authorizing the said Bouldin to sell and convey the whole of the tract. Under this conveyance, the appellant, Joseph E. Wise, is claiming by mesne conveyance, and likewise the appellees, Bouldins, are also claiming.

From 1866, the date Watts filed his petition asking the Land Office to permit him to change the description of the outboundaries of selection No. 3, until July 1899, the description as amended was recognized by the Land Department as the description of the Float. There never had been a survey. The first and only survey was made in 1905. In 1899, however, the Secretary of the Interior decided that the amended description of 1866 was invalid and that the claimants would be relegated to the description contained in the application of selection of June 17, 1863. The reason given for this by the Secretary was that the granting act of 1860 fixed a limit of three years in which the selection must be made, and that the amended description of 1866 was in fact a location of the lands taking in new lands, and as to these new lands void because they were not taken within the three-year period. The amended description was, therefore, held of no avail, and, as just stated, the parties were relegated to the original outboundaries.

In October of 1899, the heirs of John S. Watts again conveyed this land to Mr. Vroom, describing the outboundaries according to the 1863 selection. It is under this deed that the defendant and appellant, Santa Cruz Development Company, claims.

It will appear, therefore, that there are three chains of title, all eminating from John S. Watts. (1) The plaintiffs', Watts and Davis, title under the Hawley deed of 1870, under which title also the Bouldins claim the North one-half. (2) Those claiming under the deed from the heirs of John S. Watts to Bouldin, in 1884. Under this conveyance the Wises are claiming and also the Bouldins. (3) The deed of 1899, from the heirs of John S. Watts to Vroom, under which the Santa Cruz Development Company is claiming.

In addition, the appellant Wise claims under an alleged nineteenth child of Luis Maria Baca, the original Baca, called Antonio. None of the other parties claim under this alleged Antonio and maintain that there was no such person and that if there was, neither he nor his descendants made claim to the Las Vegas lands, which are the foundation of title of the lands here involved.

In 1914, the United States Supreme Court directed that the survey of the float made in 1905 be filed in the General Land Office. This was done, and thereupon and for the first time the lands involved were segregated from the public domain.

In 1914, Watts and Davis brought this action in the District Court for the United States in Arizona, making all of the other parties defendant. The judgment of the lower court was that the title obtained by John S. Watts from the heirs of Baca by the deeds of 1864 and 1871, passed to Hawley in 1870, and that the title thus passed was then vested in the plaintiffs for the South one-half of the Float and in the Bouldins for the North one-half of the Float. The court also found that there was a son called Antonio, making the nineteenth child of Luis Maria Baca, and that the defendants and appellants Wise had, by various convences, obtained that title, and that all of the Wises, Joseph E. and his wife, and Margaret, the wife of Jesse Wise, owned an undivided one-nineteenth of the whole of the Float. The court held that all of the title of John S. Watts passed out of him into Hawley in 1870, that the Bouldins obtained no title from the heirs of Watts in 1884, and that likewise Vroom obtained no title from these same heirs in 1899.

From this decision, the plaintiffs have appealed, and also the Bouldins, only from that part of the judgment awarding the Wises an undivided one-nineteenth of the

Float; the Wises have appealed from the whole judgment and so has the Santa Cruz Development Company.

It will be seen from this statement of facts that the first thing to be determined is, when the title of the Baca heirs, who, it is conceded by all the parties, had the title and conveyed it to Watts, save and except the alleged one-nineteenth of the alleged Antonio, when this title passed out of Watts. If all of Watts' title passed to Hawley in 1870, obviously any conveyances thereafter made by the Watts heirs conveyed nothing.

ARGUMENT.

IT WAS THE INTENTION OF JOHN S. WATTS TO CONVEY TO HAWLEY IN 1870 ALL OF HIS, WATTS, TITLE IN BACA FLOAT NO. 3.

It will be remembered that in 1864 the heirs of Baca conveyed to Watts, Baca Float No. 3, by the same description contained in the selection of 1863. Objections have been made, that the deed of 1864 to Watts did not carry all of the Baca title, because the deed was in part, and by some of the heirs, improperly executed, and because a certain alleged son of Baca, called Antonio, did not join. For the purpose of the present argument, we will treat the 1864 deed as having conveyed the Baca title to Watts, and take up the remaining questions later on. The controversy, therefore, is over the construction of the deed of 1870, from Watts to Hawley. It is contended on the one hand by Watts, Davis, and the Bouldins, that this deed conveyed all of Watts' title to Float No. 3 as it was originally selected in 1863, and is now finally fixed by the survey of 1905, on the face of the earth, by whatever outboundaries described in the deed; and on the other hand, by Wises and the Santa Cruz Company that it conveyed only the lands within the metes and bounds

given, namely, the selection of 1866, except as to the overlap. The question is whether Watts conveyed the 1863 or the 1866 location.

The primary rule of construction is to ascertain the intent of the grantor. This once ascertained it will control, without regard to technical rules of construction. There are certain secondary rules, which are resorted to, to ascertain the intent, where it may be in doubt. These rules, so far as applicable here, are:

(a) A deed should always be construed to take effect, rather than to fall.

(b) If a deed will admit of two constructions, it should be construed most strongly againt the grantor.

(c) Falsa demonstratio non nocet.

(d) In the construction of a deed, the court will place itself in the place of the grantor for the purpose of discovering his intention, and then, in view of all the facts and circumstances surrounding him at the time of the execution of the instrument, consider how the terms of the deed may affect the subject matter.

Let us then consider the facts and circumstances surrounding John S. Watts at the time of the execution of this paper, and then the terms of the instrument itself.

On the 2nd day of March, 1863, after the abandonment of the Bosque Redondo selection, and before the selection of June 17, 1863, in Arizona, John S. Watts, in consideration of $110,000, sold to Wm. Wrightson, one of the unlocated Floats. The conveyance recites the granting Act of June 21, 1860, to the Bacas, that Watts has full authority to make the location and cause to be made a title in fee for same after location and survey. And Watts binds himself, his heirs, etc., "to make a full and complete title in Fee Simple for said land to said William Wrightson, his assigns or legal representatives whenever thereunto required." (Record, pages 183-4.)

This bond does not designate any particular selection, but, on March 27, 1864, Watts wrote to Wrigtson, enclosing him certificate of the Register and Receiver at Santa Fe, to the effect that the location made in Arizona was conformable to the Act. "I hope this certificate will enable you to get the location confirmed." The letter and certificate found their way to the General Land Office, and were there filed May 26th, 1864, and endorsed: "Received at the Gen. Land Office, Washington, D. C. May 26, 1864. John S. Watts, Santa Fe, N. Mex. Mar. 27/64. Encloses a certificate of the Regr. at Santa Fe, N. M. to a Location No. 3, for the Heirs of Luis Maria Cabeza de Baca, in Arizona. File with Case. Hawes." (Record, page 191.)

Under the granting Act of June 21, 1860, the Bacas were permitted to select only "vacant land, not mineral." Pursuant to instructions of the General Land Office, the Register and Receiver of the Land Office at Santa Fe were required to certify that the lands were such as might be selected. The certificates of the Register and Receiver, in regard to Location No. 3, in Arizona, were made on March 27, 1864. (See opinion Secretary of the Interior, written by Justice Van Devanter of the Supreme Court, then Asst. Atty. Gen'l., 29 Land Decisions, page 46, which, by stipulation, is regarded in evidence.)

The certificates sent by Watts to Wrightson, March 27, 1864, were the certificates as to selection No. 3.

Also in a letter written by Watts to the Commissioner of the Land Office, April 30, 1866, (Record, pages 176-7) in regard to this selection, Watts says that Wrightson, while making an examination of Location No. 3, in order to have the location surveyed, discovered that a mistake had been made in the description.

Also it appears that the most prominent land mark near Location No. 3 is Mt. Wrightson, doubtless named after

the Wrightson of the title bond. (Record, page 239.) It is not a common name.

It would thus appear that the unlocated Float, mentioned in the title bond to Wrightson, was Location No. 3.

The original title bond was in possession of Watts and Davis, plaintiffs below, the grantees of Hawley, and was by them offered in evidence. The history of the paper is, that it was in all probability delivered by Wrightson to Hawley, for it is proved to have been in the possession of James Eldredge (Record, page 187), who was the attorney-in-fact of Hawley, and who, as such attorney, conveyed Hawley's title in No. 3 to Robinson. (Record, page 207, for Power, Hawley to Eldredge, pages 208 et seq., for Hawley deed to Robinson, executed by Eldredge.) From Eldredge the paper came down, with the title deeds to Watts and Davis.

When John S. Watts therefore, June 17, 1863, made selection of Location No. 3, he made it in reality for Wrightson and his assigns. This selection then, "commencing at a point one mile and a half from the base of the Salero Mountain in a direction North forty-five degrees, etc.," commonly known as the Location or Selection of 1863, belonged to Wrightson and his assigns when made. It is true, the title was still in the Bacas but Watts had bound himself to make fee simple title, when demanded.

Watts, undoubtedly in conformity with his covenants in the title bond, on the 1st of May, 1864, obtained the Baca title to No. 3, describing the outboundaries as in the selection. Watts was now in a position to fulfill his covenant to make fee simple title.

Only a short time before, it will be remembered, March 27, 1864, he had sent Wrightson the certificate by the Register and Receiver for No. 3. Sometime after this, but prior to April, 1866, Wrightson, while on Location No.

3, in order to have it surveyed, was killed. Watts did not convey to Wrightson, and the title bond, as have heretofore been shown, came into the hands of Hawley.

By reason of the fact that this bond could be transferred, without writing, and merely by delivery, it is somewhat difficult to trace it. That it could be so transferred, see authorities in main brief.

In 1866, Watts wrote to the Commissioner of the Land Office (Record, page 176), saying in brief, that June 17, 1863, he made selection of a body of land under the Act of 1860. (This was No. 3.) That because of the existence of war a personal examination of the country had not been made at the time of the selection, and that when Mr. Wrightson made an examination later with a view to a survey, it was discovered that a mistake had been made in the boundaries. Under these circumstances he asked leave to change the initial point of the boundaries so as to "commence at a point 3 miles West by South from the building known as the Hacienda de Santa Rita," running thence to take in a tract of the same size as the original. He says further, that this description will take in the land that "was believed to have been located upon" in the first place. He asks that instructions be given the Surveyor General "to correct the mistake."

The Commissioner granted the request, and directed the Surveyor General, May 21, 1866 (Record, pages 177-178) to make the survey, 'in accordance with the amended description." The survey, however, was not made.

The facts and circumstances surrounding John S. Watts, in 1870, at the time of his conveyance to Hawley, were:

(1) As far back as 1863, Watts had bound himself, in consideration of $110,000, to make fee simple title to Wrightson or his assigns of one of the unlocated Floats of one hundred thousand acres.

(2) The parties had afterwards settled, if it was not agreed at the time, that this should be Location No. 3, in Arizona, for we find Watts sending Wrightson the certificate of the Register and Receiver for this location, and we find Wrightson on No. 3, preparing to survey it.

(3) It is also established by J. Ross Brown's book on Arizona, published about 1865, and in evidence in this case, that Wrightson was on Location No. 3, mining and developing it.

(4) Watts, pursuant to his covenant to make fee simple title to Wrightson or his assigns, obtained title to No. 3 from the Bacas May 1, 1864.

(5) After this conveyance to him, and prior to 1866, Watts through Wrightson, discovered an error in the description, made it known to the Land Office, and obtained the correction.

(6) Hawley had succeeded to the Wrightson bond, and Watts was bound to give him title.

With these circumstances surrounding him, Watts executed the deed of 1870 to Hawley. This deed, in part, is:

> "* * * the said party of the first part (Watts) for and in consideration of the sum of one dollar and other valuable consideration (The title bond. This inserted by us.) lawful money of the United States of America * * * has remised, released and quit-claimed and by these presents do remise, release and quitclaim unto the said party of the second part (Hawley) and to his heirs and assigns forever, All that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the Territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States, and by the said heirs conveyed to the party of the first party by deed dated on the 1st day of May A. D. 1864, Bounded and described as follows: Beginning at a point three miles

> West by South from the building known as the Hacienda de Santa Rita, running thence," twelve miles, etc., so as to take in the one hundred thousand acres. "The said tract of land being known as Location No. 3 of the Baca Series."

In 1870, it was believed that the outboundaries of the Float were as set forth in this deed. The Government, from 1866 to 1899, regarded this as the situs of the land, the erroneous ruling of 1866 not being corrected until this date.

Under these circumstances, and under such a deed, did Hawley acquire the title granted to the Baca heirs by the United States, and by them conveyed to Watts, or did he only acquire the lands within the metes and bounds of the 1866 correction, which includes but a fragment of the lands granted to Watts? In other words, could Watts himself, had he lived to learn of the error of the Government in 1866, in permitting an amended description, and of his own error, have claimed as against Hawley, that he did not convey Baca Float No. 3, but only a fraction of it?

When Watts made this deed in 1870, he knew he had given Wrightson the title bond for an unlocated Float; he knew that this Float had been selected in 1863 and called No. 3; he knew he had acquired title from the Bacas to No. 3 that he might carry out his bond; he knew that the Wrightson bond had come to Hawley. It is unbelievable, that Watts, a lawyer, a member of the Supreme Court of New Mexico, a Congressman, would have dealt with Hawley, unless Hawley had the bond.

Watts knew, that in 1866, at his own instigation, the description had been amended, and he believed the amended description was correct. He was bound to convey Location No. 3, and he believed it occupied a certain place on the earth's surface. Knowing and believing these things, he conveyed, the one hundred thousand acres, granted by

the United States to the Bacas, by the Bacas granted to him in 1864, by the description then believed to be correct; and then granted the same thing, by another description which he himself had caused to be made, and by him believed to be correct. We have no doubt that Watts died, believing he had sold Baca Float No. 3, by the correct description.

What Watts intended to convey was the location, the Baca right, the thing the Bacas got from the Government. The land had never been surveyed; it was in a wilderness, infested with savages. He had bound himself to sell one of the unlocated Floats; he had located it, amended it, with the consent of the Government, and believed he was in good faith fulfilling his bond. Certainly no chicanery or bad faith is to be imputed to him, which would be the case if it were held that he did not intend to convey the Float.

When Watts made this deed there was no apparent error. The land was the land granted to the Bacas and by the Bacas to him. He had amended the description merely to make the hundred thousand acres lie where he originally believed it was. He did not get another deed from the Bacas to cover the amended description, because he got from the Bacas Float No. 3, their right to the thing, and he believed he had a right to have its boundaries corrected. The Government thought so, too, and let him amend. As Watts saw the light, he made no error in his conveyance to Hawley. He intended to convey Baca Float No. 3, and he did so.

Years after 1870 and Watts' death, in 1899, the Government held the amendment was an error. In view of this ruling, and the relegation of the parties to the selection of 1863, what actual, however unintentional error, is there in the deed of 1870?

In the light of subsequent events there is no error in the

thing conveyed, but only in the description of it. Watts conveyed one hundred thousand acres, being the same one hundred thousand acres granted by the Government to the Bacas, and by them conveyed to him May 1st, 1864. It is the tract known as Location No. 3 of the Baca Series. This hundred thousand acres is given outboundaries according to the amendment of 1866. What is the error? There is no error as to the amount of land; it is one hundred thousand acres. There is no error as to what hundred thousand acres. It is that granted by the Government to Bacas, and by them to Watts. The error is not as to the thing granted but only as to where it is. It is Baca Float No. 3 that is granted, but by the metes and bounds it is put in the wrong place. The real fundamental intent was to grant all the rights of Bacas and all the rights of Watts, and this was done, merely with an error (as it developed afterward), a mistake, as to outboundaries.

Discarding the error, there is plenty left in the deed to sustain it. It is that certain tract of land, of one hundred thousand acres, granted to Bacas, granted to Watts, granted to Hawley, known as Location No. 3 of the Baca Series. There was only one No. 3. Its outboundaries might have been uncertain until the survey of 1905, indeed they were, but no uncertainty existed that the Government had granted one hundred thousand acres, that the name of that grant was Baca No. 3, that the Bacas conveyed it to Watts, and Watts to Hawley. Watts intended to convey the Float to Hawley and effectually did so, although part of the description was false. As a matter of law there never was an amendment, and all description based on it is false. But always there was the grant, the right to the Bacas, to Watts, to Hawley, always there was but one No. 3, and this was the real thing bought and sold, whatever its outboundaries.

NOT ONLY DID HAWLEY OBTAIN BACA FLOAT NO. 3 FROM WATTS, BUT ALSO THE DEED GIVEN BY THE BACAS TO WATTS IN 1871, INURED TO HAWLEY'S BENEFIT.

In the beginning of the argument under the preceding head, it was stated the objections were made as to the form of execution of the deed of 1864, by the Bacas, to John S. Watts. In 1871, Watts obtained a deed from the Bacas of Location No. 5 of the Series, and in this deed is the following: "and the said heirs of Louis Ma. Baca above mentioned, now ratify and confirm the title made by us by our attorney, Tomas Cabeza de Baca to John S. Watts, his heirs and assigns on the 1st day of May, 1864, for the lands described in * * * * Location Number Three situate in Arizona Territory, containing * * * * 99.289 39/100 acres, the boundaries of which are set forth and described in said deed; and the said heirs of the said Luis Maria Baca, deceased, executing this deed as herein set forth, relinquish and quit-claim to said John S. Watts, his heirs and assigns, all their right, title and interest in all the lands in said deed of May 1, 1864, mentioned and described." (Record, page 202).

It is conceded that this deed cures the imperfections in the execution of the deed of 1864, and that it was signed by all of the heirs, except the alleged Antonio, or nineteenth child. Therefore, if this deed inures to the benefit of Hawley, the imperfections in the deed of 1864 become immaterial.

The character of the deed of 1870, from Watts to Hawley, will determine whether any subsequent title acquired by Watts inured to Hawley. If the deed of 1870 were a mere quit-claim of the right, title and interest of Watts, then any subsequently acquired title by Watts would not relate back, and inure to Hawley. if, on the other hand, the

deed carried the fee of the land itself, all subsequently acquired title would relate. The question then is whether the 1870 deed was a quit-claim or not.

The distinction between a quit-claim and a purported conveyance of the fee is: A quit-claim merely carries the chance of title, "the right, title and interest," of the grantor, whatever that may be; a conveyance that purports to convey the land itself, and not a chance to it, is not a quit-claim.

"In that case Chief Justice Roberts draws a disetinction between a mere quit-claim deed and a conveyance such as the one under consideration, which purports to convey, not the chance of the title, but the land itself. Citing with approval the case of *Van Rensselaer vs. Kearney*, already emphasized by us, he contrasts the quit-claim, conveying no more than the present interest of the grantor, and inoperative to pass an interest such as may afterwards vest,' with a conveyance which though without covenant of warranty, yet purports to convey the absolute right of the land and therefore sufficient, 'as we infer,' to pass an after acquired title. To the same purport are the cases of *Taylor vs. Harrison,* 47 Texas 460 and *Richardson vs. Levi*, 67 Texas 363."

Lindsay vs. Freeman, 18 S. W. Rep. 727, Supreme Court of Texas.

Also see *Van Rensselaer vs. Kearney*, 11 Howard 322, *Balch vs. Arnold* (Wyo.), 59 Pacific 434.

In *West Seattle vs. Novelty Co.*, 31 Wash. 435, the Court say of a deed which provided: "Said party of the first part * * * do by these presents, remise, release and forever quit-claim unto the said party of the second part his heirs and assigns, all those certain lots, etc."

"The deed in question purports to convey more than a release of the grantor's claim at that time. It conveys the

land itself, for it recites that the party of the first part does remise, release, and forever quit-claim to the party of the second part the lands described, "to have and to hold all and singular the said described premises, together with the appurtenances unto said party of the second part and to his heirs and assigns forever," In *Ankeny vs. Clark*, 1 Wash. St. 549, 20 Pac. 583, the Supreme Court of the territory said: * * * Under the statutes of our territory, a quit-claim deed is just as effectual to convey the title to real estate as any other form or deed, and a grantee in a quit-claim deed is entitled to the same presumptions as to bona fides—has the same rights—as a grantee in a deed of general warranty. This is undoubtedly true of a quit-claim deed which purports on its face to convey, not merely an interest, but the real estate itself.' See also: *Taggart vs. Risley*, 4 Or. 235; *Garrett vs. Christopher*, 74 Tex. 453, 12 S. W. 67, 15 Am. St. Rep. 858; *Balch vs. Arnold* (Wyo) 59 Pac. 434; *Field vs. Columbet*, 4 Sawy. 523, Fed. Cas. No. 4,764; *Spies vs. Neuberg* (Wis.) 37 N. W. 417, 5 Am. St. Rep. 211."

The deed of Watts to Hawley of 1870 reads: "that the said party of the first part * * * has remised, released and quit-claimed, and by these presents do remise and quit-claim unto the said party of the second part, and to his heirs and assigns forever; all that certain tract," etc.

The deed is not a quit-claim, but purports to pass the fee simple title, and therefore carries after acquired title.

In 1865 there was passed in Arizona the following Act:

"If any person shall convey any real estate purporting to convey the same in fee simple absolute and shall not at the time of such conveyance have the legal estate in such real estate, but shall afterward acquire the same, the legal

estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid as if such legal estate had been in the grantor at the time of the conveyance."

Howell Code, page 279.

This act was in force in 1870, and for many years afterward. For construction of statute see *Bogy vs. Shoab,* 13 Mo. 627, and *Frink vs. Darst,* 14 Ills. 304. In these cases it is held that a deed that purports to convey the land, and not a chance to the land, such as "right, title and interest," is within the terms of the Statute.

The deed of 1870 is not a quit-claim, but purports to convey the land itself. All title Watts acquired, therefore, by the deed of 1871, immediately inured to Hawley. This renders unnecessary any discussion of imperfections in the 1864 deed.

But the deed of 1871 from the Bacas to John S. Watts is more than a present conveyance. In it the grantors, "ratify and confirm the title made by us and our attorney." The deed of 1864 purports to be signed by all of the eighteen children of Luis Maria Baca, or their descendants. In 1871, this deed is ratified and confirmed. All of the heirs in 1871, recognize that in 1864 title passed, and now, to cure any errors, or irregularities, ratify and confirm the conveyance made then. Watts really got no new title by the latter deed but only a ratification of what he already had. All this, by relation, he had passed to Hawley.

Thus the title of all the Baca heirs passed to Hawley, except that of the alleged son, Antonio. The matter of Antonio is discussed in a separate brief. From Hawley,

the title passed to Watts and Davis, by mesne conveyances, to the South one-half and the Bouldins to the North one-half.

Respectfully submitted,

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